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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARIO ORTIZ REYES, Defendant and Appellant.	G052800 (Super. Ct. No. 13HF1398) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

A jury convicted defendant Mario Ortiz Reyes of three counts of committing lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a))[1] and one count of committing a lewd act on a child under the age of 14 by force, duress, menace, or threat (§ 288, subd. (b)(1)). The court sentenced defendant to a total prison term of 14 years.

Defendant appealed the judgment and we appointed counsel to represent him. Counsel did not argue against defendant, but advised he was unable to find an issue to argue on defendant's behalf. Defendant was given an opportunity to file written argument on his own behalf, but he did not do so.

We have examined the entire record but have not found an arguable issue. (*People v. Wende* (1979) 25 Cal.3d 436.) Accordingly, we affirm the judgment.

FACTS

In 2013, the victim K. lived in a two story house with her mother P.S.; K's aunt A.P. and A.P.'s five children; P.S.'s aunt N.L. and N.L.'s three children; and N.L.'s boyfriend (defendant). A.P.'s oldest child was 13 years old, and N.L.'s oldest child was 14 years old. A door with a lock connected the interior of the house with an attached garage. The bedrooms were upstairs.

When K. was 11 years old, defendant more than once touched her buttocks and vagina, which were body parts she did not want him to touch. He touched her buttocks over her clothes and her vagina both over and under her clothes. He told her that her "butt [was] big and huge."

During the first occurrence, defendant came up behind K. when she was on the couch, grabbed her shoulders, and said she had beautiful eyes and that he liked her

[1] All statutory references are to the Penal Code.

lips. He tried to kiss her cheek, but she pushed him away and went to her room where her cousin was. Later, he came into her room and told her not to tell anyone or he would hurt her and her family. K. closed the door and stayed in her room. Because of defendant's threat, she did not tell anyone what had happened.

One day, K. asked N.L. if she could get a yogurt from the refrigerator in the garage. K. entered the garage. Defendant followed her through the doorway and locked the door behind him. He grabbed her wrist, pulled her, and told her to come over here. She said "no" and told him to leave her alone. He said he wanted to be alone with her. K. heard the door handle moving and N.L. saying, "Open the door." K. opened the door, told her aunt she was going upstairs, and left.

Another time, K. was upstairs near the bathroom and the washer and dryer. Defendant touched her vagina beneath her clothes. K. heard her sister coming, so she said, "Help me, he's tickling me. Tell him to stop." She said he was tickling her because she did not want her sister to find out and tell their mother.

Another time, K. climbed the stairs and saw defendant there. He "got" her, "put his hand" on her mouth, and pulled her "where the laundry was." He touched her vagina outside her clothes. K. went to her room and stayed there where she felt safe and started playing her iPad.

Defendant never showed his genitals to K. and never asked her to touch them.

One day in April 2013, as K. and her mother sat in church together, K. began crying. K.'s mother asked what was going on. K. said, "Nothing." Her mother said, "'Tell me, please. I see something has been wrong.'" K. then told her mother that defendant would touch her every time she went up the stairs or was on the stairs, and say that her face was very beautiful, and that he had threatened to harm the children if K. said anything. During a subsequent police interview, K.'s mother said K. told her at the

church that defendant had touched her buttocks and her face, but did *not* say that defendant had touched K.'s vagina "skin-to-skin."

K. testified defendant gave her money, but that was *not* the reason she allowed him to touch her. She did not recall whether she ever asked him for money. She never told her mother that defendant put his hand on her vagina "skin-to-skin." Nor did she reveal this to a doctor who interviewed her or to the first officer (a male) who came to her home or to two officers and a social worker who collectively interviewed her for one hour and 30 minutes (even though these last interviewers specifically asked her if there was skin to skin contact and she denied it). It was not until K. was interviewed by a social worker from the Child Abuse Services Team (CAST) that she claimed defendant touched her vagina skin-to-skin.

K. explained she did not tell her mother all the details because her mother had started to cry at the church, and K. did not want to say any more because it would make her mother feel worse. She did not tell the doctor about defendant touching her vagina because the doctor might cry and "it was hard for [K.] to say" it, and when she talked about it, she herself would start to cry, so she did not "feel like saying that anymore." She "was trying to forget it." K. did tell the second male officer who interviewed her that defendant had touched her vagina.

K. told the CAST interviewer that defendant touched the part inside the crack of her vagina, and K. thought that might be called "cherry popping," a term she heard from someone at school. CAST has forensic interviewers who specialize in speaking with children. The interview "room is set up with a small table so the child feels more eye-to-eye with the interviewer." The room contained teddy bears, different colored bean bags, and a large white board on which the child can color.

Defendant was interviewed at his home on April 23, 2013, by three investigators and a social worker. A recording of the interview was played for the jurors, who also received a transcript.

During the interview, an interviewer asked defendant whether people in the household had told him about something that was bothering them about him. Defendant said "no," or "[m]aybe if" he had made a mistake or failed to respect them, he did not know. After being encouraged to tell the truth, defendant said maybe they told the police he was with "the lady's daughter." He said the lady had sent him downstairs to take a sheet to the garage, then K. arrived and asked him if he wanted cereal and milk. He did not close the garage door. He did not notice if it was locked. Then she came in and the door closed and was locked. N.L. knocked and said, "What are you two doing?" He replied, "Nothing." The other time he was at the washtub with the laundry. Suddenly K. arrived and asked him for money. He told her he would give her money if he had it, but he did not have any. Defendant denied pulling K.'s arm in the garage. An interviewer asked what happened when defendant told K. to kiss him. Defendant said he could not recall, because he drank that day and blacked out and maybe "disrespected her one day." He denied ever touching her buttocks. When an interviewer asked when he had touched K.'s vagina over her clothes, defendant responded, "That I did, yes, I did touch her." He said K. told him to touch her and to give her money, but he told her he had no money. He then said he touched her leg, not her vagina. He then said K. asked him to touch her vagina, but he refused and told her that she was "little" and her mom would get angry. He then said he touched her navel area. An interviewer asked why defendant's DNA was in the crotch area of K.'s pants. Defendant answered, "Then . . . I was drunk, I don't know." Later, he said that once when he was waiting to use the bathroom, K. came out of her room four times and asked him for $25 to $60. He did not have the money. Asked if that was when he touched her vagina over her clothes, he responded, "Uh-huh." He said the contact lasted about two seconds. He gave K. no money at that time but told her he would give her some when he had it. He admitted he got excited and had an erection. Later, he admitted touching K.'s face, telling her she was beautiful, and trying to kiss her (but she pushed him away), downstairs on the couch, but said he was drunk at the time.

He admitted telling her not to tell her mom. He told her three times not to tell her dad about it. In the garage, N.L. told defendant he could get "in trouble."

The sole witness called by the defense — an investigator for the district attorney's office assigned to sexual assault cases — testified that he and the prosecutor interviewed K. at her home about K.'s statement to a social worker that defendant had inserted his finger into her vagina. K. replied defendant touched the outside of her vagina near her inner thigh. Asked to describe K.'s demeanor when talking about this subject, the investigator testified, "Reluctant would be an understatement." "She literally couldn't say where he touched her. I mean she was having a hard time just even talking about it." She refused to say the word "vagina." All she could do was point to an area on a little diagram drawn by the investigator.

DISCUSSION

Pursuant to *Anders v. California* (1967) 386 U.S. 738, defendant's appellate counsel has suggested we review the entire record to determine whether defendant's conviction of committing a lewd act on a child under the age of 14 by force, duress, menace, or threat (§ 288, subd. (b)(1)) is supported by substantial evidence. We have done so.

Duress in the context of sexual crimes "involves psychological coercion." (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.) It "can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes." (*Ibid*.) "'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress." (*Ibid*.) "'Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the

molestation would result in jeopardizing the family.'" (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

People v. Wilkerson (1992) 6 Cal.App.4th 1571, 1574 involved two 12-year-old victims of multiple counts of child molestation. The defendant was the grandfather of one victim, and both victims were frequently left under his care. (*Id*. at p. 1575.) One of the victims stated she engaged in sexual acts with the defendant because he would "spoil" her and give her what she wanted. (*Ibid*.) The victims also complied because they feared him, since he "drank a lot and would become violent when drinking," and since the molestations often took place when he was drunk. (*Ibid*.) The Court of Appeal held that the total circumstances — including the defendant's authority position and the victims' statements that the defendant "'made'" or "'forced'" them to engage in various sex acts and that they were afraid of him due to his drinking — supported an inference that their "participation was impelled, at least partly, by an implied threat . . . ." (*Id*. at p. 1580.)

"[T]he force requirement will be deemed satisfied when the defendant uses any force that is 'different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim's consent.' [Citation.] [¶] According to the majority of courts, this includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.)

Here, defendant's conviction is supported by substantial evidence of both duress and force, and the potential lack thereof is not reasonably arguable on appeal. Shortly after the first incident, defendant came into K.'s room (her attempted safe harbor) and told K. not to tell anyone or he would hurt her and her family, including the children. In the garage, he grabbed her wrist, pulled her, and told her to come over to him. Near the washer and dryer, he "got" her, covered her mouth, and pulled her toward the laundry.

Upon our independent review of the entire record we are unable to find an arguable appellate issue.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.